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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 432

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21,
Petitioner

v.

WILLIAM WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
I. The Situation	4
II. The Decision of the District Court	11
III. The Decision of the Court of Appeals	13
Reasons for Granting the Writ	16
Conclusion	38
Appendix A, Decision of District Court	1a
Appendix B, Decision of Court of Appeals	7a
Appendix C, Judgment of Court of Appeals	34a
Appendix D, Title VII of the Civil Rights Act of 1964	35a

AUTHORITIES CITED

Cases:

Bowe v. Colgate-Palmolive Co., 416 F.2d 711	27
Boys Markets v. Retail Clerks' Union, Local 770, 38 U.S. Law Week 4462	25
Brown v. Sterling Aluminum Products Corp., 365 F.2d 651	37
Butler v. Laborer Union, 61 CCH Lab. Cas. ¶ 9348	27
Central Contractors Ass'n. v. IBEW, Local 46, 61 CCH Lab. Cas. ¶ 9347	24
Civil Rights Cases, 109 U.S. 3	19

Page

Clark v. American Marine Corp., 304 F.Supp. 603 24
Colbert v. H-K Corp., 295 F.Supp. 1091 25
Conley v. Gibson, 355 U.S. 41 36
Cox v. United States Gypsum Co., 248 F.Supp. 74 27
Czosek v. O'Mara, 397 U.S. 25 36
Culpepper v. Reynolds Metal Co., 296 F.Supp. 1232, reversed, 421 F.2d 888 ..... 25, 32
Dobbins v. Local 212, IBEW, 292 F.Supp. 413 24
F.T.C. v. Bunte Bros., 312 U.S. 349 24
Freese v. John Morrell & Co., 60 CCH Lab. Cas. ¶9232 27
Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 36
Hall v. United States, 92 U.S. 27 18
Harrison v. American Can Co., 2 FEP Cases 1 ..... 25, 30
International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 ..... 31, 33
James v. Ogilvie, 2 FEP Cases 697 24
Jenkins v. United Gas Corporation, 400 F.2d 28 27
Jones v. Alfred H. Mayer Co., 392 U.S. 409 .... 16, 17, 24, 25
Kendrick v. American Bakery Co., 69 LRRM 2012 ... 25
McAllister v. Magnolia Petroleum Co., 357 U.S. 221 .. 30
Mickel v. South Carolina State Employment Service, 377 F.2d 239 27
Miller v. International Paper Co., 408 F.2d 283 27
Mondy v. Crown Zellerbach Corp., 27 F.Supp. 258 ... 27
Moody v. Albemarle Paper Co., 271 F.Supp. 27 27
N.L.R.B. v. Hearst Publications, 322 U.S. 111 32
Norman v. Missouri Pacific R.R., 68 LRRM 2796 25
Republic Steel Corp. v. Maddox, 379 U.S. 650 35
Romero v. International Terminal Operating Co., 358 U.S. 354 24
Smith v. Evening News Asso., 371 U.S. 195 35
Smith v. North American Rockwell Corp., 2 FEP Cases 561 ..... 25, 30
Sokolowski v. Swift and Co., 286 F.Supp. 775 27
Stebbins v. Nationwide Mutual Ins. Co., 382 F.2d 267 .. 27
Vaca v. Sipes, 386 U.S. 171 35
Van Zandt v. McKee, 202 F.2d 490 23
Washington v. Baugh Construction Co., 61 CCH Lab. Cas. ¶ 9346 24

STATUTES AND RULES: Page

42 U.S.C. § 1981 ..... 2, 3, 12, 13, 14, 16, 17, 18, 19, 20, 22, 23, 24, 25, 28, 29, 30
42 U.S.C. § 1982 18
Civil Rights Act of 1866, 14 Stat. 27 ..... 16, 20
Civil Rights Act of 1875, 18 Stat. 335 19
Fed. R. Civ. Proc. 19 13
Illinois Fair Employment Practices Act, §§ 3, 8, 10 ... 33
Ill. Rev. Stat. ch. 48 § 851 (1967) 33
Ill. Rev. Stat. ch. 83 § 16 (1967) 31
Labor Management Relations Act § 301(a), 1947 .... 3, 13, 34, 35, 37
National Labor Relations Act, 61 Stat. 136, 29 U.S.C. § 151 12
Title VII, Civil Rights Act of 1964, 78 Stat. 241, 253-66, 42 U.S.C. §§ 1971, 2000e-2000e-15. 3, 12, 13-14, 23, 25, 29
§ 701(b) 30
§ 702 30
§§ 703, 704 30
§ 706 ..... 27, 30
§ 706(a) 26
§ 706(d) 31
§ 706(e) 26, 29
§§ 710, 713 30

MISCELLANEOUS:

Cong. Globe, 39th Cong., 1st Sess. 95, 1124, 1160, 1183. 21
Cooley, A Treatise In The Law Of Torts, 276 (1879) .. 22
Labor Relations Reports, State Labor Laws, 1:30 (BNA, 6-9-69) 34
Report of Carl Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) 21
Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1865) 21
Restatement, Contracts, § 147 (1932) 37
Sovern, Legal Restraints on Racial Discrimination In Employment (1966) 24
Summers and Wellington, Cases and Materials on Labor Law 59 (1968) 26

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Order of American Bricklayers and Stone Masons, Local 21, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on April 28, 1970 (*infra*, p. 34a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2 FEP Cases 574 (*infra*, pp. 7a-33a). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 301 F. Supp. 663 (*infra*, pp. 1a-6a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," prohibits racial discrimination in private employment.

2. Whether, assuming that 42 U.S.C. § 1981 bars racial discrimination in private employment, it has been superseded in its specific application to that wrong by the later enactment of Title VII of the Civil Rights Act of 1964, which unambiguously denounces discrimination in employment because of "race, color, religion, sex, or national origin," and which creates a comprehensive scheme for the regulation of that subject.

3. Whether, assuming that 42 U.S.C. § 1981 bars racial discrimination in private employment, the limitations period applicable to an action based on it brought in Illinois claiming racial discrimination in employment is, as a matter of federal law, either the limitations period established by Title VII of the Civil Rights Act of 1964, or the 120-day period established by the Illinois Fair Employment Practices Act, rather than the five-year period provided by Illinois for "civil actions not otherwise provided for."

4. Whether section 301(a) of the Labor Management Relations Act, which invests federal district courts with jurisdiction over "[s]uits for violation of

contracts between an employer and a labor organization," (a) supports a claim by applicants for employment who have no contractual nexus with the bargaining unit that the employer violated its collective bargaining agreement with the union, and that the union wrongfully failed to act to secure the rights conferred by the agreement, and (b) if it does, whether the claim can be asserted in the absence of any attempt by the applicants for employment to secure corrective action from the employer or the union pursuant to the contractual procedure before resort to court action.

STATUTES INVOLVED

1. 42 U.S.C. § 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. The relevant provisions of Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 253-66, 42 U.S.C. §§ 1971, 2000e-2000e-15) are set forth *infra*, pp. 35a-56a.

3. Section 301(a) of the Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. § 185(a)) provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor or-

ganizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

I. The Situation

William Waters and Donald Samuels, Negro bricklayers, claim (1) that the Wisconsin Steel Works of International Harvester Company (the Company) denied their April 1966 mail applications for employment as bricklayers at the Chicago plant of the Company because of their race, and (2) that on June 15, 1966, the Company and United Order of American Bricklayers and Stone Masons, Local 21 (the Union), entered into a racially discriminatory amendment of an existing agreement. The complaint and the affidavits supporting and opposing the complaint show that:

Of a force of 4,575 employees, of whom 1,700 are minority group members (R. 156), the Company employs a small force of bricklayers which between 1964 and 1968 has fluctuated in number from 34 to 59 (R. 144, 158). The Union represents the bricklayers in a unit composed of "all bricklayers, bricklayer apprentices, and bricklayer leaders" (R. 51), and the terms of their employment are governed by a collective bargaining agreement between the Company and the Union (R. 50-93). The agreement prohibits racial discrimination in the following terms (R. 51):

> Neither the Company nor the Union, in carrying out their obligations under this Contract, shall discriminate in any manner whatsoever against any employe because of race . . . .

> The Company agrees to continue its present non-discriminatory policy offering equal opportunities for available jobs to qualified applicants without regard for their . . . race . . . .

The agreement provides that, "[w]here ability, fitness, and skill are sufficient to fulfill the requirements of the job in an efficient manner, seniority shall govern in cases of increase and decrease of forces and in filling vacancies and new jobs" (R. 84). It further provides that an employee acquires seniority only after ninety days of employment (*ibid.*):

> No seniority rights shall accrue until an employe shall have worked ninety (90) days of accumulated active service . . . , but after attaining ninety (90) days of such accumulated active service such employe shall rank for seniority from the first day of employment.

Among other reasons seniority is "broken" when, "[d]ue to layoff because of no work, a period of more than two years has elapsed since the employe last worked for the Company" (*ibid.*). "Former employes reentering service after their seniority has been broken . . . shall be considered new employes" (R. 85). However, even as to employees with broken seniority, the agreement provides that employees "who had two (2) or more years of seniority", but who had been laid off longer than two years, "shall be given consideration (in order of their former seniority) when new employees are being hired" (*ibid.*).[1] The agreement

[1] The Company's Industrial Relations Manager explains that "Wisconsin Steel Works has a practice of long standing to recall laid off employees prior to hiring new applicants. There is no contractual obligation to recall former employes off the roll for more than two years; however, our practice is followed in all instances" (R. 252).

establishes a grievance procedure for the adjustment of "differences" (R. 86-87), and requires arbitration of "those grievances which raise an issue of violation of the terms of this agreement" (R. 87). The agreement stipulates that its provisions "constitute the sole procedure for the processing and settlement of any claim by an employe or the Union of a violation by the Company of this Agreement" (R. 90). Finally, the agreement provides that the "parties reserve the right to amend and supplement this Agreement by mutual agreement at any time during the duration thereof" (R. 91).

Before June 1964 the Company had no black bricklayers in its employ (R. 5). On July 13, 1964, the Company hired William Waters; other black bricklayers were hired about then (R. 5, 99). On September 11, 1964, the Company laid off Waters because of a decrease in operations (R. 99). Nine other bricklayers with no seniority, including six whites, were laid off at the same time (R. 142).

On September 16, 1964, Waters filed a complaint against the Company with the President's Committee on Equal Employment Opportunity charging that his layoff on September 11 was based on his race (R. 142, 145-146). The Company was informed on March 1, 1965, that the Committee found that "there was no evidence to substantiate the allegations of discrimination filed by . . . William Waters . . ." (R. 142, 147).

On April 2, 1966, Donald Samuels made, and the next day the Company received, a mail application for his employment as a bricklayer (R. 100, 237). Samuels had never before been employed as a bricklayer by the Company (R. 100). On April 3, 1966, the Company

received from William Waters a mail application for his employment as a bricklayer (R. 143, 156). At the time these applications were received, over twenty former bricklayers were on layoff, of whom four had seniority rights (R. 143).

On May 20, 1966, Waters and Samuels filed charges with the Illinois Fair Employment Practices Commission claiming that the Company refused to hire them pursuant to their mail applications because of their race (R. 151, 153). On August 25, 1966, the Illinois FEPC informed Waters and Samuels that their charges had been dismissed because "there is not substantial evidence that the alleged unfair employment practice has been committed" (R. 24, 26).

On May 23, 1966, three days after they had filed their charges with the Illinois FEPC, Waters and Samuels filed charges with the Equal Employment Opportunity Commission, claiming that the Company "failed to take action on their applications for employment as bricklayers, filed on April 3, 1966", because of their race (R. 156, 155). On February 16, 1967, the EEOC concluded that "[r]easonable cause does not exist to believe that . . . [the Company] is violating Title VII of the Civil Rights Act of 1964, as alleged" (R. 158).

Meanwhile, on March 2, 1965, the Company and the Union had entered into a letter agreement reciting that the "March 1965 discontinuance of the Open Hearth operation necessitates a reduction in force" among the bricklayers, and providing in consequence for "severance allowances to be paid certain bricklayers . . ." (R. 143, 148). The agreement divided the laid-off bricklayers into three classes. The first class covered twelve bricklayers who had eight to ten

years of seniority. The agreement provided that "[i]f these employes (1) have not been recalled by the Company before the end of . . . [two years from the date of their March 1965 layoff] and (2) are able, willing and available to perform work for the Company, they shall be entitled to receive upon request a lump sum Severance Allowance in the amount of $1127.00" (R. 148). The second class covered eight bricklayers with about six years seniority. The agreement provided that these employees "shall be entitled to elect to receive a Severance Allowance in the amount of $966.00", such election to be made in writing within thirty days of layoff or be forfeited (R. 148). An election to receive this allowance, it was also provided, "shall break an employe's service . . ." (R. 148). The third class of bricklayers covered those employees "who have less than three years seniority"; the agreement provided that they "shall not be entitled to any Severance Allowance" (R. 149). Finally, the agreement provided that, "[i]f the aforesaid employees are, subsequent to their receipt of Severance Allowances, rehired by the Company, they shall be employed with the employment rights of new employes . . ." (R. 149).

On June 15, 1966, fifteen months later, the Company and the Union revised their March 2, 1965 severance agreement to provide for restoration of seniority to the laid-off bricklayers in class 2—those employees with six years seniority who broke their service upon their election within thirty days of layoff to receive a severance allowance of $966 (R. 143, 154). The amendatory agreement reads in part that (R. 154):

> The present employment demand for Bricklayers was unforeseen at the time of our 1965 Severance Agreement, and based upon our actual ex-

> perience under the aforementioned Agreement, the division of employes covered by that Agreement has proved to be inequitable. As a matter of fair practice and to provide just treatment for long service employes, the Company and the Union mutually agree to restore to those employes identified in Section 2 of the March 2, 1965 Agreement, their seniority for purposes of Section 8 of our Labor Agreement only.

The obvious basis for the agreed restoration of seniority was that receipt of the sum of $966 was too high a price to pay for the relinquishment of six years seniority by employees for whom at the time of election no prospect of future employment with the Company was contemplated but who now have the unforeseen opportunity to reenter the Company's service. Three laid-off bricklayers with restored seniority were recalled to work during June and July, 1966, and January 1967 (R. 5-6).[2]

As stated, on February 16, 1967, the EEOC concluded that no reasonable cause existed to believe that the

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[2] The return to work of these three bricklayers, in advance of new applicants or laid-off employees who had never acquired seniority, was not dependent on the seniority restoration agreement. Although the seniority of the laid-off employees who had accepted a severance allowance had been broken under the terms of the March 2, 1965 severance agreement, the basic collective bargaining agreement explicitly provided that employees with broken seniority "who had two (2) or more years of seniority . . . shall be given consideration (in order of their former seniority) when new employees are being hired" (R. 85, *supra*, p. 5 and n. 1). Accordingly, vis-a-vis laid-off employees who had never acquired seniority or new applicants, the seniority restoration agreement did not improve the sequence of recall of the employees who had accepted a severance allowance. With or without the seniority restoration agreement, they were still entitled to consideration for recall in advance of new applicants or laid-off employees who had not acquired seniority.

Company had engaged in racial discrimination in employment (*supra*, p. 7). On March 10, 1967, the EEOC transmitted its decision to the parties; on March 20, the EEOC received a request for reconsideration from Waters; on June 14, the EEOC approved the request for reconsideration (R. 162, 159). The evidence to support the request for reconsideration was the agreement to restore the seniority of the laid-off bricklayers who had received a severance payment (R. 163-164). The EEOC on July 10, 1968, found on the basis of the seniority restoration agreement that "[r]easonable cause exists to believe that the . . . [Company] violated Title VII of the Civil Rights Act of 1964, as alleged" (R. 165).

On July 18, 1968, the EEOC informed the Company that conciliation would be attempted (R. 160). On November 29, 1968, it wrote to the Company expressing its "regret that a satisfactory settlement could not be reached", and on the same day it notified Waters and Samuels that "you may, within thirty (30) days of the receipt of this communication, institute a civil action in the appropriate Federal District Court" (R. 17, 19-20).

Meanwhile, on March 8, 1967, the Company had notified Waters that a position as a bricklayer was available (R. 99). At the same time similar notices were also sent to the other three black and six white bricklayers who had been laid off with Waters on September 11, 1964 (R. 143). Waters returned to work on March 20, 1967 (R. 99). He was laid off on May 19, 1967, because of a decrease in operations (*ibid*). At the same time that Waters, who had no seniority, was laid off, two bricklayers with seniority were also laid off (R. 144). On August 30, 1967, the Company notified

Waters that a position as a bricklayer was available, but he declined to accept employment with the Company (R. 100, 234).

At no time did Waters or Samuels file a charge against the Union with either the EEOC or the Illinois FEPC (R. 15-16, 22-23). At no time did Waters or Samuels complain to the Union of a breach of contract or request the Union to adjust any differences between them and the Company (R. 29). Nor did Waters or Samuels ever file a grievance with the Company relating to racial discrimination under the agreement (R. 144). Although not alleged in the complaint, Waters and Samuels by affidavit averred their belief that it "would be futile" to request the Union to prosecute their grievances "through contractual channels" (R. 234-235, 238).

II. The Decision of the District Court

On December 27, 1968, Waters and Samuels filed a complaint against the Company and the Union with the United States District Court for the Northern District of Illinois, Eastern Division, alleging that (R. 7):

> . . . WISCONSIN STEEL and LOCAL 21, have discriminated against Negro bricklayers by denying said Negro bricklayers equal opportunities for employment, retention and advancement without regard to race. Defendants' conduct has prevented plaintiffs from making and enforcing employment contracts with the same freedom and on the same basis enjoyed by white bricklayers. The conduct of which plaintiffs complain was in direct violation of the terms of the collective bargaining agreement then in effect between defendant WISCONSIN STEEL and defendant LOCAL 21, and its breach caused substantial detriment to plaintiffs and the

> class they represent. The decision of defendant LOCAL 21 to enter into the aforementioned agreement constituted an arbitrary action and was undertaken with discriminatory motives, in bad faith and in contravention of the UNION's statutory [sic] duty to fairly represent all of its members regardless of race.

The complaint averred that the "action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, . . . ; the Civil Rights Act of 1866, 42 U.S.C. Section 1981 . . . , [and] Section 301 (a) of the Labor-Management Relations Act, 29 U.S.C. Section 185(a) . . ." (R. 2).[8] When this complaint was filed the Company had forty-four bricklayers in its employ, four of whom were Negroes, and all of whom had seniority rights under the collective bargaining agreement (R. 144).

On motions to dismiss or for summary judgment the District Court on July 14, 1969, dismissed the complaint. First, with respect to 42 U.S.C. § 1981, the District Court held that, in view of the comprehensive regulation of racial discrimination in employment by Title VII of the Civil Rights Act of 1964, to "now apply Section 1981 unnecessarily to employment contracts would create a body of law independent from and in potential conflict with the detailed congressional scheme regulating employment embodied in Title VII. Therefore, this court concludes that it does not have jurisdiction over this matter by reason of the Civil Rights Act of 1866" (*infra*, p. 43a). Second, assuming the applicability of 42 U.S.C. § 1981, "the action would be barred as untimely" (*ibid.*). Apply-

[8] A violation of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. § 151) was also alleged but later abandoned.

ing to "suits under Section 1981 the limitation period applicable to the most analogous claim under state law", a section 1981 employment discrimination claim "is most analogous to a claim under the Illinois Fair Employment Practices Act, which contains a mandatory 120-day filing period" (*ibid.*). Third, the complaint cannot be brought against the Union under Title VII of the Civil Rights Act of 1964 because no charge had been filed against the Union with the EEOC (*infra*, pp. 5a-6a). And, since the relief sought by the plaintiffs would impair the rights of the Union and the individual bricklayers, the complaint must also be dismissed against the Company because of the absence of parties "needed for just adjudication" under Fed. R. Civ. Proc. 19 (*ibid.*). Fourth, no action lies under section 301(a) of the Labor Management Relations Act. "A prerequisite to suit under Section 301 (a) is that an employee at least attempt to exhaust exclusive grievance and arbitration procedures established in the bargaining agreement" (*infra*, p. 6a). And here the complaint does not allege that "a formal effort to pursue contractual or administrative remedies would be 'absolutely futile'" (*ibid.*).

III. The Decision of the Court of Appeals

On appeal the Court of Appeals reversed and remanded for trial. While the reversal was unanimous, the basis for it was not. Chief Judge Swygert writing for himself and Senior Circuit Judge Castle, with Circuit Judge Fairchild concurring on separate grounds,

The majority opinion sustained the statement of a claim under 42 U.S.C. § 1981 and Title VII of the

Civil Rights Act of 1964 upon grounds which were summarized as follows (*infra*, pp. 11a-12a):

> We hold that a right to sue under section 1981 for "private" racial discrimination in employment existed prior to 1964. By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue. However, in order to avoid irreconcilable conflicts between the provisions of section 1981 and Title VII, a plaintiff must exhaust his administrative remedies before the EEOC unless he provides a reasonable excuse for his failure to do so. Since we find on the basis of the material before us that plaintiffs have sufficiently justified their failure to charge Local 21 before the EEOC, we hold that the district court erred in dismissing plaintiffs' complaint against the union. Accordingly, we reverse for trial on the merits of plaintiffs' complaint against Local 21 under section 1981 and against Harvester under Title VII.

The majority further held that the action under 42 U.S.C. § 1981 was not barred by the 120-day limitations period of the Illinois Fair Employment Practices Act, but was "subject to the five-year statute of limitations provided in Ill. Rev. Stat. ch. 83 § 16 (1967), governing civil actions not otherwise provided for" (*infra*, pp. 26a-27a).

The majority sustained an action based on section 301(a) of the Labor Management Relations Act, not in reliance upon the seniority restoration agreement on which plaintiffs rested, but upon the ground that "the complaint along with the accompanying affidavits of plaintiff Waters, if broadly construed, may be read to include allegations that plaintiffs were treated in a discriminatory fashion by Harvester in violation of the contract between Local 21 and Harvester" (*infra*,

p. 28a). The opinion does not spell out this thought. The majority excused the plaintiffs' failure to attempt to exhaust their contractual remedies by concluding that "we are unable to say beyond a doubt that plaintiffs' allegations of futility are insufficient to excuse their failure to exhaust the grievance provisions of their contract" (*infra*, p. 29a). Plaintiffs were permitted on remand to amend their complaint "to allege with greater specificity which provisions of the collective bargaining agreement were violated by Harvester" (*infra*, p. 28a), and "to allege circumstances supporting their assertion that attempts to persuade Local 21 to pursue their grievances would be futile" (*infra*, p. 29a). Lastly, the majority read the complaint to allege, in violation of the duty of fair representation, that the "union has prevented presentment or enforcement of an employee grievance under the collective bargaining agreement," and this breach states a claim under section 301(a) (*infra*, p. 31a).

Circuit Judge Fairchild travelled a different route. In his view plaintiffs could bring a Title VII action against the Company in the absence of the Union and the employees, and could bring a Title VII action against the Union although no charge had been filed against it with the EEOC (*infra*, pp. 32a-33a). Accordingly, while he read 42 U.S.C. § 1981 to reach racial discrimination in private employment, he found it unnecessary to resolve "the difficult question of whether and to what extent the enactment of Title VII restricted reliance upon § 1981" (*infra*, p. 33a).

REASONS FOR GRANTING THE WRIT

This case presents, as the Court of Appeals observed, "important questions concerning the availability and scope of various federal remedies for combating racial discrimination in employment" (*infra*, p. 7a). Central to the answer to the questions is the meaning of this Court's decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, from which the Court of Appeals deduced that 42 U.S.C. § 1981 "is intended to prohibit private racial discrimination in employment by companies and unions" (*infra*, p. 13a). The questions have provoked a diversity of judicial opinion which requires resolution. And early settlement is essential so that all may know the mode by which their rights may be realized and their responsibilities discharged.

I

42 U.S.C. § 1981 and 42 U.S.C. § 1982 had a common origin in the Civil Rights Act of 1866 (14 Stat. 27). Section 1982 provides that "All citizens shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This Court holds that "§ 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property," and included within that interdict is the refusal of a white man to sell a house to a black man because he is black. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413. Section 1981 provides that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ." The Court of Appeals in this case holds, based on the compulsion it perceives in *Jones* v. *Mayer*, that

section 1981 bars all racial discrimination in private employment, governmental as well as nongovernmental, and included within that interdict is the refusal of a white man to hire a black man because he is black. We may assume that the force of the reasoning of *Jones* v. *Mayer* requires the conclusion that section 1981, no less than section 1982, prohibits all interference with the rights it confers whether the source of that interference is private or governmental action. But *Jones* v. *Mayer* does not define, contrary to the uncritical supposition into which the Court of Appeals slides, the scope of the right conferred by section 1981. In other words, while we may assume that section 1981 bars both private and governmental interference, it is still necessary to ascertain just what it is that section 1981 safeguards from interference. It is the determination of that question which requires this Court's decision.

The right "to make and enforce contracts" of course embraces the right to make and enforce employment contracts. But it is not limited to employment contracts. It extends to every service, product, or relationship for which a person can contract. It is open-ended. The very generality of the subject—"contracts" unlimited—to which the right appertains therefore points to the common denominator which defines its scope. Central to the right to make and enforce contracts is the *legal capacity* to enter contractual relationships and to realize the fruits of the compact. Section 1981 invests in every person the same legal capacity "to make and enforce contracts" that a white person has.

Relating the right to the legal capacity of the person to make and enforce contracts fits the history of section 1981. As an antislavery measure its purpose was to

endow the former slave with the civil rights of a free man. A slave as a chattel belonging to another had no competence to contract. *Hall* v. *United States*, 92 U.S. 27. To elevate the slave to the status of a free man required that he be given the capacity to contract, and to assure the equality of his status required that he be given the same right to contract as a white man had.

Relating the right to contract to legal capacity is also in keeping with the context of section 1981. For, in addition to the right "to make and enforce contracts," section 1981 confers on all the right "to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property. . . ." The whole of the section thus bespeaks endowment of equal juristic personality, the quality of being a free man equal to any other in the eyes of the law.

Relating section 1981 to legal capacity also conforms to the distinction which is suggested by the division of section 1981 from section 1982. If Section 1981 prohibits a person from refusing to contract with another because of his race, it virtually engulfs section 1982. Except possibly for the right "to inherit," the prohibition of a racial refusal "to inherit, purchase, lease, sell, hold, and convey real and personal property" would be unequivocally embraced within, and would be rendered redundant by, a prohibition of a racial refusal "to make and enforce contracts." To "purchase, lease, sell, hold, and convey property" are but specific incidents of contracting. Thus, read harmoniously, section 1981 confers the legal capacity to contract, and section 1982 goes further and prohibits a racial refusal to contract with respect to the specific subject of real and personal property.

Finally, confining the right "to make and enforce contracts" to legal capacity corresponds with the understanding of the contemporaneous Congress which enacted the Civil Rights Act of 1875 (18 Stat. 335). That statute, invalidated in the *Civil Rights Cases*, 109 U.S. 3, provided that:

> . . . all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns; public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

To stay at an inn, travel by public carrier, or attend a public entertainment are all particular manifestations of the general act of contracting. If section 1981 already barred a racial refusal to "make and enforce contracts," Congress enacted a redundancy when in 1875 it required racial equality in the "enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement. . . ."

In short, as this Court stated in the *Civil Rights Cases*, 109 U.S. 3, 22, the "*disability* . . . to make contracts" was one of the "burdens and incapacities" which were the "inseparable incidents" of slavery, and "the same right" as a white man had "to make and enforce contracts" conferred by section 1981 was designed to eliminate that disability and thereby to assure that aspect of "the essence of civil freedom." (Emphasis supplied.)

In order to protect the legal capacity to make and enforce contracts which it confers, section 1981 may be interpreted to require not only assurance of equal juristic competence but also prevention of the recurrence of any "condition of slavery or involuntary servitude" which would nullify legal freedom to contract by disabling the practical exercise of it. The Civil Rights Act of 1866 granted equal civil rights upon the citizenry "without regard to any previous condition of slavery or involuntary servitude. . . ." It is abolition of the "condition of slavery or involuntary servitude" which shapes the scope of section 1981. That condition was in the first instance the source of the legal incapacity to contract; reestablishment of the practical equivalent of that condition would result in recreation of practical if not legal incapacity to contract. To safeguard the legal capacity to contract which it confers, section 1981 may therefore also protect against the formation of a substituted state of involuntary servitude. The reach of that substantive protection can be limned by considering with particularity the milieu from which section 1981 emerged and the evil which was apprehended as it relates to labor.

The emergence of free labor and the abolition of slave labor brought forth efforts by former masters to preserve the substance if not the form of slavery. Schemes were formulated to keep the freedmen in practical bondage. Freedmen were required to work for their former masters; they were not allowed to work for others without the consent of their former masters; they were prohibited from leaving their employment or being unemployed; their compensation was fixed by a combination of employers at a substandard

level; and they were not paid for their labor.[4] Subservience to this system of labor was coerced by the use of force, vagrancy laws, and pass systems.[5] The pith of such plans is described in the report of Carl Schurz as follows:[6]

> The negro is not only not permitted to be idle, but he is positively prohibited from working or carrying on a business for himself; he is *compelled to* be in the "regular service of a white man, and if he has no employer he is *compelled* to find one. It requires only a simple understanding among the employers, and the negro is just as much bound to his employer "for better and for worse" as he was when slavery existed in the old form. If he should attempt to leave his employer on account of nonpayment of wages or bad treatment he is *compelled* to find another one; and if no other will take him he will be *compelled* to return to him from whom he wanted to escape. The employers, under such circumstances, are naturally at liberty to arrange the matter of compensation according to their tastes, for the negro will be compelled to be in the regular service of an employer, whether he receives wages or not.

Thus, white employers, "while accepting the 'abolition of slavery', . . . think that some species of serfdom, peonage, or some other form of compulsory labor is

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[4] Cong. Globe, 39th Cong., 1st Sess., 95, 1124, 1160, 1833; Report of Carl Schurz, S. Exec. Doc., No. 2, 39th Cong., 1st Sess., 17, 19, 21-25, 28-30, 32-35, 48-49, 83-87, 90, 92-94 (1865); Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess.; I 107-108, II 54-55, 56, 83, III 5, 6, 25, 27, 30, 31, 36, 41, 142, 143, 149, 173-174, IV 9, 37, 64, 86, 121, 125, 141 (1866).

[5] *Ibid.*

[6] Report of Carl Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 24 (1865).

not slavery. . . . There are a hundred ways of framing apprenticeship, vagrancy, or contract laws, which will serve the purpose."[7]

The essence of the evil was thus to compel a man to be in the service of another against his will. The problem was *not* the refusal of a white employer to hire a black man because of his race. On the contrary, the white employer sought to put and keep the black man in his service without his consent. The idea therefore was to free the black man to seek employment where he chose. As it relates to employment, therefore, section 1981 sought to create a free labor market, one in which the black man was at liberty to dispose of his labor to whatever employer was willing to hire him, but one in which the would-be employer was at equal liberty to refuse to hire the applicant for any reason including his race.

This scope for section 1981 as it relates to the right "to make and enforce contracts" is in keeping with the ethos contemporary with the emergence of section 1981 as evidenced by a prominent treatise published in 1879. "Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf, or to hire it out in service of others. This is one of the first and highest of civil rights." Cooley, A Treatise On The Law Of Torts, 276 (1879). But this right to offer one's services was paralleled by the right of others to refuse the offer for any reason. "It is part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason,

[7] *Id.* at 35.

or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern." *Id.* at 278. This was the undisputed conventional wisdom concerning federal legal control of labor race relations until Congress worked a fundamental change by the enactment of Title VII of the Civil Rights Act of 1964. Until 1964, concerning racial discrimination in private employment, it was utterly correct to state, as a Court of Appeals stated as recently as 1953, that the "right to life, liberty, and pursuit of happiness, includes the right to work and earn an honest living; but it does not include the right to work for any particular individual without the latter's consent. One man's right to work stops short of the other fellow's right not to hire him." *Van Zandt* v. *McKee*, 202 F.2d 490 (C.A. 5).

This reading of the maximum scope of section 1981 fits with precision the enactment by Congress of Title VII of the Civil Rights Act of 1964 unambiguously barring discrimination in private employment based on "race, color, religion, sex, or national origin." The struggle for statutory prohibition of racial discrimination in private employment began in earnest in the 1940's. The struggle was led by informed, imaginative, and zealous people. It was won nationally in 1964. No one in the course of that fight suggested that a statutory bar to racial employment discrimination already existed in the form of section 1981. During the legislative evolution of Title VII itself not a word was said hinting that its enactment as it related to racial labor discrimination filled no void because section 1981 comprehended the subject. A leading study of legal control of racial discrimination in private em-

ployment published in 1966 does not so much as mention section 1981.[8] Not until after this Court decided *Jones* v. *Mayer* in 1968 did some suddenly discover by an expansive reading of that decision that Congress had one hundred and two years before in passing section 1981 enacted a Fair Employment Practices Act barring racial discrimination in private employment. So latter-day a discovery of the seminal significance of so ancient a statute means, if accurate, that until two years ago everyone had been acting on the wrong premise and fighting an unnecessary battle. That is not the way the world works. The "want of assertion of power by those who presumably would be alert to exercise it" eloquently bespeaks its lack of existence. *F.T.C.* v. *Bunte Bros.*, 312 U.S. 349, 352. "The presumption is powerful that such a far-reaching dislocating construction . . . was not uncovered by judges, lawyers or scholars for . . . [one hundred and two] years because it is not there." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371.

The question of the applicability of section 1981 to support an action for racial discrimination in private employment has provoked a diversity of judicial opinion, some courts holding that it supports an action,[9]

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[8] Sovern, Legal Restraints on Racial Discrimination in Employment (1966).

[9] *Clark* v. *American Marine Corp.*, 304 F. Supp. 603, 609-611 (E.D. La.); *Washington* v. *Baugh Construction Co.*, 61 CCH Lab. Cas. ¶ 9346 (W.D. Wash. Oct. 10, 1969); *Central Contractors Asso.* v. *IBEW, Local 46*, 61 CCH Lab. Cas. ¶ 9347 (W.D. Wash. Sept. 30, 1969); *Dobbins* v. *Local 212, IBEW*, 292 F.Supp. 413, 442 (S.D. Ohio). And see, *James* v. *Ogilvie*, 2 FEP Cases 697, 698 (N.D. Ill. March 20, 1970).

and others that it does not.[19] It is essential that this contrariety of judicial opinion be resolved. It is essential that the meaning of this Court's decision in *Jones* v. *Mayer* in its relationship to section 1981 be determined. It is essential that the applicability of section 1981 to racial discrimination in private employment be settled.

II

Assuming that 42 U.S.C. § 1981 bars racial discrimination in private employment, it is necessary to face the question whether it has been superseded in its specific application to that wrong by the later enactment of Title VII of the Civil Rights Act of 1964, which unambiguously denounces discrimination in employment "because of . . . race, color, religion, sex, or national origin," and which creates a comprehensive scheme to regulate that subject. The requirement that an earlier statute yield to a later enactment in order to effectuate the congressional design is of course familiar. *Boys Markets* v. *Retail Clerks' Union, Local 770*, 38 U.S. Law Week 4462 (S. Ct. June 1, 1970).

The incompatibility between the uncharted scope of section 1981 and the comprehensiveness of Title VII is demonstrable by the conflict which this case exposes. "The primary rights created by . . . [Title VII] are,

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[19] *Smith* v. *North American Rockwell Corp.*, 2 FEP Cases 561 (N.D. Okl. Feb. 25, 1970); *Harrison* v. *American Can Co.*, 2 FEP Cases 1 (S.D. Ala. July 8, 1969); *Kendrick* v. *American Bakery Co.*, 69 LRRM 2012, 2013 (N.D. Ga. July 29, 1968); *Norman* v. *Missouri Pacific R.R.*, 68 LRRM 2796 (E.D. Ark. June 27, 1968), remanded without reaching this question, 414 F.2d 73, 75, n. 3 (C.A. 8); *Culpepper* v. *Reynolds Metal Co.*, 296 F. Supp. 1232, 1236, n. 2 (N.D. Ga.), remanded without reaching this question, 421 F.2d 888, 895 (C.A. 5); *Colbert* v. *H-K Corp.*, 295 F. Supp. 1091 (N.D. Ga.).

in general, far-reaching and generously conceived. The reach of those rights, however, is determined by the administrative structure and enforcement procedures which require critical examination."[11] Initial responsibility to vindicate the rights conferred is entrusted to the Equal Employment Opportunity Commission. Action by the EEOC is triggered by a charge filed with it alleging the commission of an unlawful employment practice. § 706(a). The EEOC is required to "make an investigation of such charge. . . ." *Ibid.* If it determines, "after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* Litigation begins only after the opportunity for investigation and conciliation has been afforded. If within a prescribed time after the charge has been filed, "the Commission has been unable to obtain voluntary compliance . . . , the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge. . . ." § 706(e). "The theory of the Act . . . is that all efforts should be made to eliminate discriminatory practices by informal conferences, conciliation and persuasion outside of the public view, free from the heat and pressures which develop when a charge of discrimination is publicly aired."[12] The structure of Title VII therefore "limits access to the courts by conditioning the filing of suit upon a previous administrative charge with the EEOC whose

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[11] Summers and Wellington, Cases and Materials on Labor Law, 59 (1968).

[12] *Ibid.*

function is to effectuate the Act's policy of voluntary conference, persuasion and conciliation as the principal tools of enforcement. The key to the courthouse door . . . [is] the administrative charge. . . ." *Jenkins* v. *United Gas Corporation*, 400 F.2d 28, 30 (C.A. 5).

Accordingly, faithful to the statutory requirement that the EEOC be afforded a prior opportunity to investigate and conciliate a claim against the charged party, and in obedience to the explicit statutory command that limits the party against whom a civil action may be brought to "the respondent *named in the charge*" (§ 706, emphasis supplied), it has been settled by an unbroken line of decisions that no Title VII action may be brought against a person unless a charge against that person had been filed with the EEOC.[13]

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[13] *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (C.A. 7) (charge filed against the employer but not the union); *Miller* v. *International Paper Co.*, 408 F.2d 283, 291 (C.A. 5) (although charges were filed against employer, if none have "been filed against the unions, the appellants' right to file suit against the unions has not ripened"); *Stebbins* v. *Nationwide Mutual Ins. Co.*, 382 F.2d 267 (C.A. 4), cert. denied, 390 U.S. 910 (no charge filed); *Mickel* v. *South Carolina State Employment Service*, 377 F.2d 239 (C.A. 4), cert. denied, 389 U.S. 877 (charge filed against employment agency but not the employer); *Butler* v. *Laborers' Union*, 61 CCH Lab. Cas. ¶ 9348 (N.D. Ill. Oct. 9, 1969) (charges filed against two local unions but not District Council); *Sokolowski* v. *Swift and Co.*, 286 F. Supp. 775 (D. Minn.) (charges filed against employer and local union but not international union); *Cox* v. *United States Gypsum Co.*, 284 F. Supp. 74 (N.D. Ind.), modified, 409 F.2d 289 (C.A. 7) (all charges against employer but only some against union); *Mondy* v. *Crown Zellerbach Corp.*, 271 F. Supp. 258 (E.D. La.), reversed on other matters, 398 F.2d 496 (C.A. 5) (charges filed against employer and local union but not international union); *Moody* v. *Albemarle Paper Co.*, 271 F.Supp. 27 (E.D.N.C.) (charges filed against employer and local union but not international union); *Freese* v. *John Morrell & Co.*, 60 CCH Lab. Cas. ¶ 9231 (S.D. Iowa Nov. 16, 1966) (charge filed against employer but not union).

This is so even though the underlying situation has been subject to investigation and conciliation by the EEOC based on a charge filed against *another* person.[14] For the heart of the matter is that the statute does not make a person answerable in a private civil action against *him* unless *he* has been informed by a charge against *him* that *his* conduct is in question, and the EEOC by that charge has had the opportunity to focus its investigation on *him* and to direct its conciliatory efforts at *him* if it determines that there is reasonable cause to believe that the charge against *him* is true. In no other way can there be assurance that the statutory opportunity for administrative ministration will be afforded a person before that person is entangled in litigation. Accordingly, as no charge was filed against the Union with the EEOC in this case, no Title VII action could be brought against it.

In conflict with the statutory bar to maintenance of the action against the Union which Title VII erects, the Court of Appeals nevertheless permits the selfsame suit to be maintained against the Union based on section 1981. It accomplishes this feat by adding to section 1981, subtracting from Title VII, and creating a new statutory scheme. In deference to the requirement of prior recourse to the EEOC the Court of Appeals states that "we do not think that aggrieved persons should be allowed intentionally to by-pass the Commission without good reason" (*infra*, p. 23a). It therefore holds that "an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies" (*ibid.*). It considers plaintiffs' allegations, which pre-

[14] See cases cited in preceding note.

sumably require proof, to be "sufficient to justify their failure to charge Local 21 before the Commission" (*ibid.*). It canvasses the allegations and concludes that "Local 21 suffered only slight prejudice from the failure of plaintiffs to charge it before the EEOC" (*infra*, pp. 23a-24a).

The result is at war with Title VII. The flat ban against bringing a civil action against a person not "named in the charge" (§ 706(e)) is discarded. A new standard is formulated and put in its place. A civil action may be brought against a person although no charge has been filed with the EEOC against him so long as the omission is unintentional, justifiable, and only slightly prejudicial. The issues of intent, justification, and prejudice must of course be tried, including as part of that triable range an assessment of the probable efficacy of prior recourse to the EEOC in the particular circumstances, in conflict with the congressional judgment that an opportunity for administrative handling should be afforded in every case. This recast may be the statute that Congress should have passed. It is not the statute that Congress did pass. Neither unrestricted suit based on section 1981, nor the diluted precondition to suit under section 1981 fashioned by the Court of Appeals, is compatible with the scheme that Congress created in Title VII.

Nevertheless, although Title VII barred the action against the Union in this case, the Court of Appeals permits the action to be maintained based on section 1981. This important incident of irreconcilable conflict between Title VII and section 1981 is paralleled throughout the range of the applicability of the two statutes. Title VII contains numerous exemptions

which are absent from section 1981;[15] Title VII is comprehensive in defining the discrimination it prohibits, the qualifications it recognizes, and the exceptions it makes (§§ 703, 704), while section 1981 leaves the scope of prohibited and permissible conduct wholly at large; Title VII is elaborate in the procedural detail with which it prescribes the time and manner for recourse to, and the operation of, state agencies, the EEOC, and the courts (§§ 706-710, 713), while section 1981 is entirely open-ended. Accordingly, as the District Court observed in this case, to "now apply Section 1981 unnecessarily to employment contracts would create a body of law independent from and in potential conflict with the detailed congressional scheme regulating employment embodied in Title VII" (*infra*, p. 4a). Application of section 1981 within the field occupied by Title VII "runs afoul," another court stated, "of the more comprehensive, later and thus in all events pre-emptive provisions of Title VII." *Smith* v. *North American Rockwell Corp.*, 2 FEP Cases 561, 565 (N.D. Okl. Feb. 25, 1970).[16] At the least it presents a question which this Court should settle.

III

Assuming the applicability of 42 U.S.C. § 1981 to racial discrimination in private employment, a further question which requires this Court's consideration is the appropriate limitations period applicable to actions based on it asserting a claim of racial job discrimina-

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[15] For example, Title VII does not cover employers with less than twenty-five employees (§ 701(b)), an Indian tribe (*ibid.*), a private membership club (*ibid.*), or an educational institution (§ 702).

[16] See also, *Harrison* v. *American Can Co.*, 2 FEP Cases 1 (S.D. Ala. July 8, 1969).

tion. The Court of Appeals chooses the five-year period prescribed by Illinois for "civil actions not otherwise provided for . . ." [17] (*infra*, pp. 26a-27a). The choice is fundamentally wrong and the consequence of the choice in the administration of Title VII severely harmful.

The choice of a limitations period for a federal action where the national statute on which the suit is based provides none is a federal question. *International Union, UAW*, v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701, 704-705, 706. The choice need not be fixed by referral to state law but may draw from a cognate federal statute where that best serves the congressional design. *Cf.*, *McAlister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. An action based on section 1981 asserting racial discrimination in employment presents the exact claim with which Congress deals in Title VII and for which it has specified a limitations period. A charge must be filed with the EEOC "within ninety days after the alleged unlawful employment practice occurred," except that where prior recourse is required to a state or local agency, "such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . ." § 706(d). Thus the longest period that Congress permits for the initiation of a proceeding under Title VII is two hundred and ten days.

The time prescribed by Congress for the initiation of a proceeding under Title VII is the period that

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[17] Ill. Rev. Stat. Ch. 83 § 16 (1967).

should be adopted for the commencement of an action under section 1981 where the claim is racial discrimination in employment. First, the wrong is identical under both statutes, and Congress having specifically expressed its judgment as to the appropriate time limitation for that wrong under one statute, its judgment should be followed under the other statute. Second, the relative shortness of the period prescribed in Title VII embodies the judgment of Congress that repose should be quick in this class of case. "Congress, in placing the various time limitations in Title VII, was attempting to eliminate the problem of 'second thought complaints,' stale complaints and the hampering effect they can have on our labor market." *Culpepper* v. *Reynolds Metal Co.*, 421 F.2d 888, 892 (C.A. 5). This judgment of Congress is entitled to adherence as much under section 1981 as under Title VII. Third, a common time-bar under both statutes for the same wrong promotes uniformity. It avoids the incongruity of fifty and more different time-bars based on the accident of the place where suit is brought with respect to federal legislation "intended to solve a national problem on a national scale."[18] Lastly, only a common time-bar drawn from Title VII can prevent collision with Title VII in litigation under section 1981. For it is bootless to bar the action as a Title VII claim when the identical action can be brought as a section 1981 claim. The will of Congress for quick repose is surely disrespected when the consequence of the time-bar under Title VII is, not quietus, but a statutory name-change in the complaint.

But if there is to be referral to state law rather than Title VII for the appropriate limitations period, seri-

[18] *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 123.

ous questions are presented by the failure of the Court of Appeals to choose the Illinois Fair Employment Practices Act [19] as the "most analogous" state action for the purpose of determining the applicable state time-bar (*infra*, p. 26a). The characterization of an action "for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law." *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 706. A claim of racial employment discrimination based on section 1981 asserts the same wrong which the Illinois FEPA prohibits. The latter statute bars as an "unfair employment practice" discrimination in employment "because of . . . race, color, religion, national origin or ancestry. . . ." § 3. It establishes a Commission which investigates charges, seeks adjustment by conference and conciliation if the charge has merit, issues a complaint and conducts an adversary hearing if informal adjustment fails, requires that the offensive conduct cease and affirmative action to correct it be taken if the complaint is determined to be well-founded, and seeks judicial enforcement of its order if it has been violated. §§ 8, 10. This familiar type of regulatory scheme deals with the same conduct that section 1981 would adjudicate and eventuates in the same relief that section 1981 would confer. It is surely the "most analogous" state action. The limitations period relevant to it therefore controls the federal action as well. The Illinois FEPA requires that the proceeding be initiated "within 120 days after the date that an unfair employment practice allegedly has been committed. . . ." § 8(a). Accordingly, reference to state law fixes the limitations period at 120 days for section 1981 actions brought in Illinois.

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[19] Ill. Rev. Stat. ch. 48 § 851 (1967).

Reference to state law surely must be to that state law which expresses the pertinent state judgment on timeliness. In Illinois, for the wrong of racial discrimination in employment, that judgment is embodied in its Fair Employment Practices Act, as it is in the thirty-eight other States which have Fair Employment Practices Acts.[20] The repudiation by the Court of Appeals of the relevance of the Illinois FEPA is thus not confined in its impact to Illinois but has nationwide significance. And the choice which the Court of Appeals did make—that limitations period for civil actions for which Illinois has not otherwise provided—has least appeal. For the "not otherwise provided for" time-bar is a catchall which expresses no state judgment related to the nature of the particular action; it expresses only a judgment that there should be some limitation for whatever action has not been specifically thought about. But Illinois, like Congress, did specifically think about limitations for an action for racial employment discrimination, and both expressed a judgment in favor of quick repose. That joint judgment should be respected.

The question of the limitations period to apply to section 1981 actions based on racial employment discrimination is important and bound to recur. This Court should settle it.

IV

To find that plaintiffs asserted a supportable claim of contract violation under section 301(a) of the Labor-Management Relations Act, the Court of Appeals reads

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[20] Labor Relations Reporter, State Labor Laws, 1:30 (BNA, 6-9-69).

the papers with the utmost looseness, and then remands to the District Court to permit an amendment to the complaint which would articulate the divined claim with specificity. The Court of Appeals concludes that, "if broadly construed," plaintiffs sought to assert that (1) the Company in violation of its agreement with the Union treated plaintiffs discriminatorily, that (2) the failure of plaintiffs to attempt to remedy the contract breach through the contractual adjustment procedure was excusable because recourse to it would be futile, and that (3) the Union violated its duty of fair representation by invidiously failing to prosecute plaintiffs' contract claim against the Company (*infra*, pp. 27a-31a).

This Court holds that an individual employee may maintain an LMRA § 301 action against his employer based on a claim that the employer has denied him a contract right which the collective bargaining agreement confers on him, *Smith* v. *Evening News Asso.*, 371 U.S. 195, 200-201, but only if the employee has attempted to exhaust the grievance and arbitration procedure established by the agreement, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, and not even then unless the union has defaulted in the discharge of its duty of fair representation in the prosecution of the grievance, *Vaca* v. *Sipes*, 386 U.S. 171, 185-186. Plaintiffs have no possible basis to excuse bypassing these preconditions to a contract action by them. Plaintiffs have made *no* attempt to invoke, much less to exhaust, the contractual remedies; they have ignored the contract altogether. Plaintiffs have in *no* way apprised the Union of their grievance, so that the Union cannot be charged with a failure to fairly represent them in the prosecution of a grievance when the Union has

not been made aware of the grievance. And bypass of the Company and the Union cannot be justified by a claim of futility. The fundamental preconditions to suit would be utterly subverted were it possible to require trial of the truth of the hypothetical plea that, although no attempt to secure corrective action from the Company or Union was even made, no prior resort to them was necessary because it would have been useless. This Court has never permitted, and should put a prompt end to the notion of the allowability of, so facile a finesse. In *Czosek* v. *O'Mara*, 397 U.S. 25, the employees "repeatedly requested the defendant unions and their officials to process their claims against the Railroad" (407 F.2d 674, 677); in *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 326, the employees "called upon the Brotherhood to process a grievance on their behalf under the machinery provided by the Collective Bargaining Agreement"; in *Conley* v. *Gibson*, 355 U.S. 41, 43, the employees made "repeated pleas" to the Union.

But even if a plausible basis has been sufficiently averred to excuse bypassing the contractual remedies and to charge a violation of the duty of fair representation, the fundamental flaw in plaintiffs' position has still not been overcome. And that flaw is that plaintiffs are not covered by the agreement and therefore have no standing to claim a violation of the agreement.

The agreement states in terms that its scope is confined to "the employes in the bargaining unit" (R. 50); "the provisions of this Agreement apply" to the employees within the unit (R. 51); the "general purpose of this contract is to secure for the employes certain desired working conditions . . ." (R. 88). And this contractual explicitness confining the agreement to the

employees covered by it simply expresses what would in any event be implied. An agreement is not made for all the world. It is not to be enforced by all the world.

Neither plaintiff is within the contract unit or has a contractual nexus with the unit. Donald Samuels has never worked for the Company. He is therefore an utter stranger to the agreement. William Waters worked for the Company sixty-one days in 1964 (*supra*, p. 6) and sixty-one days in 1967 (*supra*, p. 10). The agreement is explicit that "[n]o seniority rights shall accrue until an employe shall have worked ninety (90) days of accumulated active service . . . with no single layoff in excess of thirty (30) days" (R. 84), and equally explicit that "the Company shall be at liberty to discharge probationary employes (i.e., employes who have not yet acquired seniority rights) for any reason which it deems sufficient" (R. 85). As an applicant for employment without seniority status, Waters is therefore a legal stranger to the agreement.

"Under certain restricted circumstances the law clearly allows" individual employees "to bring an action under § 301 to enforce their individual rights." *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651, 656 (C.A. 8), cert. denied, 386 U.S. 957. But it must be *their* individual rights. For "an individual to bring an action under § 301 he must be seeking to enforce a right personal to him and vested in him at the time of the suit." *Id.* at 657. Strangers to the agreement, like Samuels and Waters, are simply not within the class for whom the agreement creates rights, and have no standing to enforce the agreement. As applicants for employment, the maximum status that either Samuels or Waters has is that of an incidental

beneficiary of the agreement, and an "incidental beneficiary acquires by virtue of the promise no right against the promisor or promisee." Restatement, Contracts, § 147 (1932). And since, when not in the Company's actual employ, Samuels and Waters take nothing by the agreement, the Union could not possibly violate a fiduciary duty owed them in the prosecution of a grievance under the agreement, the only claim that the Court of Appeals finds that they could make at all (*infra*, p. 31a).

The important question which is thus presented is whether strangers to a collective bargaining agreement can claim rights under it and have standing to enforce it in an LMRA § 301 action. It is difficult enough to keep the enforcement of a collective bargaining agreement manageable when it is confined to the employees covered by the agreement. It is impossible when the agreement is opened up to all the world.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1970.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 2483

WILLIAM WATERS and DONALD SAMUELS, each individually and on behalf of all others similarly situated, *Plaintiffs*,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, a corporation, and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, an unincorporated association, *Defendants*,

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*.

Memorandum and Order on Motions To Dismiss

The defendants in this class action have moved to dismiss or, in the alternative, for summary judgment. The Equal Employment Opportunity Commission (EEOC) requested and was granted leave to file a brief as a friend of the court. For the reasons set forth below, this court is of the opinion that the motions to dismiss should be granted.

Plaintiff William Waters, a Negro bricklayer, was a probationary employee of the defendant Wisconsin Steel Works of International Harvester Company (Company) from July 13, 1964, to September 11, 1964, and from March 20, 1967, to May 19, 1967. He was offered a position again on August 30 or 31, 1967, but he declined the offer. On September 16, 1964, Waters filed a complaint against the Company with the President's Committee on Equal Employment Opportunity. The complaint was dismissed on March 1, 1965. Plaintiff Donald Samuels, also a Negro bricklayer, has never been employed by the Company, but on April 3, 1966, he submitted an application for employment. On May 20, 1966, the plaintiffs filed charges against

the Company with the Illinois Fair Employment Practices Commission (FEPC), alleging that the Company had discriminated against them. The Illinois FEPC dismissed these charges on August 17, 1966, for lack of substantial evidence. In accordance with Title VII of the 1964 Civil Rights Act, the plaintiffs filed charges with the EEOC against the Company within 30 days after the dismissal by the Illinois FEPC. 42 U.S.C. § 2000e *et seq.* On February 16, 1967, the EEOC found that there existed no reasonable cause to believe that the Company had violated Title VII. On June 14, 1967, the EEOC granted plaintiff Waters request for reconsideration. The EEOC, on July 10, 1968, withdrew its previous "no cause" finding and issued a new decision that the Company had violated Title VII of the 1964 Civil Rights Act by a discriminatory recall of three white bricklayers in June and July, 1966, and January, 1967. The EEOC notified the plaintiffs that its conciliation efforts with the Company had been fruitless and advised them to proceed in a federal district court.

The plaintiffs filed the instant complaint in this court on December 27, 1968, against both the Company and Local 21 of the United Order of American Bricklayers and Stone Masons (Union).[1] The plaintiffs here allege that the defendants practice a racially discriminatory seniority system. Three statutes are invoked by the plaintiffs to support this court's jurisdiction: Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Each of these statutes will be treated in turn.[2]

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[1] Both plaintiffs were at one time members of the defendant Union.

[2] The plaintiffs have withdrawn their argument that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, also supports this court's jurisdiction, since exclusive jurisdiction under that act is vested in the National Labor Relations Board.

THE CIVIL RIGHTS ACT OF 1866

Section 1 of the Civil Rights Act of 1866 provides that

> "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981.

The question whether state action must be alleged to sustain a claim under Section 1981 is presently unsettled. Prior to the Supreme Court's decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a showing of state action was vital to such a claim. E.g., Civil Rights Cases (*United States* v. *Stanley*), 109 U.S. 3 (1883); *Hurd* v. *Hodge*, 334 U.S. 24 (1948). In *Jones*, *supra*, it was first held that Section 1982, barring discriminatory practices in real estate dealings, applied to private as well as state action. The *Jones* decision was foreshadowed by earlier decisions which prohibited racial restrictions on the sale of property. *Hurd* v. *Hodge*, *supra*; *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Buchanan* v. *Warley*, 245 U.S. 60 (1917). There is no similar trend of decisions applying the provision under consideration here, Section 1981, to the actions of private parties. The likelihood that the Supreme Court will not extend Section 1981 to private employment contracts is evidenced by the enactment of Title VII of the Civil Rights Act of 1964. Title VII expressly forbids racial discrimination in hiring by private employers and provides more definitive remedies than would be available even if Section 1981 were made applicable to private action. By providing such complete relief under Title VII, Congress did not anticipate the development of a then nonexistent and redundant remedy under Section 1981. An expansionist interpretation of Section 1981 would add little

to the protection of private employment contracts from racial discrimination that is not already available under Title VII and would ignore the apparent congressional intent that Title VII be the exclusive enforcement procedure against discrimination in employment contracts. To now apply Section 1981 unnecessarily to employment contracts would create a body of law independent from and in potential conflict with the detailed congressional scheme regulating employment embodied in Title VII. Therefore, this court concludes that it does not have jurisdiction over this matter by reason of the Civil Rights Act of 1866.

This court observes, however, that even if it did have such jurisdiction, the action would be barred as untimely. Federal courts are required to apply to suits under Section 1981 the limitation period applicable to the most analogous claim under state law. *Hileman* v. *Knable*, 391 F.2d 596 (3rd Cir. 1968); *Halligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Jones* v. *Jones*, No. 16755 (7th Cir. March 5, 1969). An action alleging discriminatory employment practices under Section 1981 is most analogous to a claim under the Illinois Fair Employment Practices Act, which contains a mandatory 120-day filing period.[3] Ill. Rev. Stat. 1967, ch. 48 § 858. Indeed, the plaintiffs here previously filed charges concerning the subject matter of this complaint with the Illinois FEPC. The practices complained of occurred on specific dates during the years of 1964, 1966 and 1967. The complaint was filed on December 27, 1968. Therefore, even if this court had Section 1981 jurisdiction, the claim would be barred.

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[3] Filing periods which are conditions precedent to suit are often referred to as statutes of limitation. For example, the limitation period in the Federal Employer's Liability Act is referred to as a statute of limitations even though it is a condition precedent to recovery. *Wabash Ry. Co.* v. *Bridal*, 94 F.2d 117, 121 (8th Cir. 1938). See also *Carpenter* v. *Erie R. Co.*, 132 F.2d 362 (3rd Cir. 1942); *Reat* v. *Illinois Cent. R.R.*, 47 Ill.App.2d 267 (1964).

THE CIVIL RIGHTS ACT OF 1964

The Union has moved to dismiss the complaint insofar as it asserts Title VII of the 1964 Civil Rights Act as the basis of this court's jurisdiction, on the ground that the Union was not named in the underlying charge before the EEOC. The company, named in the EEOC charge, agrees and moves to dismiss for failure to join an indispensable party under Rule 19, Federal Rules of Civil Procedure.

In their claim under Title VII, the plaintiffs seek injunctive relief against both the Company and the Union to prohibit enforcement of existing seniority provisions in their collective bargaining agreement, to require publication by both defendants of job openings, to "restructure" the existing seniority system established by their collective bargaining agreement, and to give the plaintiffs seniority over all other bricklayers hired since the date of the alleged acts of discrimination. Under such circumstances, both the Union and the individual bricklayers whose seniority might be adversely affected must be before the court. Title VII provides that "a civil action may . . . be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(e). A party not brought before the EEOC, such as the Union here, cannot be sued in a Title VII action in a federal court. *Miller v. International Paper Co.*, CCH Empl. Prac. ¶ 9211 (59 Lab. Cas.) (5th Cir. 1969); *Freese v. John Morrell & Co.*, CCH Empl. Prac. ¶ 9231 (60 Lab. Cas.) (S.D. Iowa 1966). In *Miller*, the court expressly held that

> [t]his circuit has already made clear—as we have reiterated in this opinion—that charging parties cannot bypass the EEOC. Therefore, *if charges of employment discrimination have not been filed against the union, the appellants' [plaintiffs] right to file suit against the unions has not ripened.* CCH Empl. Prac. ¶ 9211 at 6874. (Emphasis supplied.)

Therefore, this court finds that joinder of the Union as a party to the proceeding brought by the plaintiffs before

the EEOC is a condition precedent to joining the Union in the present case. The plaintiffs having failed to do so require dismissal of the Title VII claim against the Union. Consequently, the plaintiffs' claim against the Company must also be dismissed because the Union and the bricklayers who would be adversely affected in this case are parties "needed for just adjudication" under Rule 19.

THE LABOR MANAGEMENT RELATIONS ACT

The complaint alleges that the plaintiffs were injured by a "direct violation" of the collective bargaining agreement between the Company and the Union, in violation of Section 301(a) of the Labor Management Relations Act. A prerequisite to suit under Section 301(a) is that an employee at least attempt to exhaust exclusive grievance and arbitration procedures established in the bargaining agreement. *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965); *Ford* v. *General Electric Co.*, 395 F.2d 157 (7th Cir. 1968). The plaintiffs have not even attempted to follow the grievance procedures established by the contract. They have not filed a grievance with the Company, nor have they demanded that the Union represent them in any grievance procedure. The complaint is therefore fatally defective under Section 301(a) since it does not contain an allegation that a formal effort to pursue contractual or administrative remedies would be "absolutely futile." *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 331 (1969).

It is therefore ordered that the defendants' motions to dismiss be, and they are hereby granted, and the cause is hereby dismissed.

EDWIN A. ROBSON
Judge

July 14, 1969

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969
JANUARY SESSION, 1970

No. 17895

WILLIAM WATERS and DONALD SAMUELS, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, a corporation, and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, an unincorporated association,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 28, 1970

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and FAIRCHILD, *Circuit Judge*.

SWYGERT, *Chief Judge*. This appeal raises important questions concerning the availability and scope of various federal remedies for combating racial discrimination in employment. Plaintiffs, William Waters and Donald Samuels, brought a class action seeking damages and injunctive relief against the Wisconsin Steel Works of International Harvester Company and Local 21, United Order of American Bricklayers and Stone Masons. They alleged that Harvester, with the assistance of Local 21, maintained a discriminatory hiring policy designed to exclude Negroes, including the plaintiffs, from employment as bricklayers at Wisconsin Steel Works. Plaintiffs

claimed that these allegations of racial discrimination stated a cause of action under four separate statutes: section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to e-15; section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a); and the National Labor Relations Act, 29 U.S.C. §§ 151 to 167.[1] On the motion of defendants the district court dismissed plaintiffs' complaint. The plaintiffs appeal from the order of dismissal. We reverse and remand for trial.

In this appeal we must determine whether plaintiffs have stated a cause of action under any of the statutory grounds cited in their complaint. We treat the district court's dismissal of the complaint as a summary judgment for the defendants and consider the affidavits presented in the district court to supplement the bare allegations of the complaint.[2]

The facts as alleged in the complaint and supplemented by affidavits are not in material dispute. Harvester employs over forty-five hundred persons at Wisconsin Steel Works in Chicago, including a small force of bricklayers (less than fifty men). Local 21 is the exclusive bargaining representative for the bricklayers employed by Harvester.

The complaint alleges that prior to June 1964 Harvester, with the acquiescence of Local 21, maintained a discriminatory hiring policy which excluded Negroes from

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[1] Plaintiffs withdrew their claim under the National Labor Relations Act in the district court. Although the allegation of jurisdiction under that provision has not been stricken from the complaint, it was not reasserted on appeal. We, therefore, deem it to be waived. *See* III-B, *infra*.

[2] The district court's order of dismissal was not denominated as a summary judgment for the defendants. Nevertheless, affidavits were submitted by both sides and were not excluded by the court. From its memorandum opinion it is evident that the district court considered these affidavits. Moreover, all parties have relied on affidavits to some extent in this appeal. See FED. R. CIV. P. 12(c).

employment as bricklayers. During June 1964 five Negroes, including William Waters, were hired as bricklayers. Waters, a member of Local 21, worked in that capacity from June 13, 1964 until he was laid off on September 11, 1964. Nine other bricklayers including all of the Negroes hired in June were discharged at that time.

Under the collective bargaining agreement workers achieve seniority only after ninety consecutive days on the job. Thus all of the Negro bricklayers hired in June 1964 worked as probationary employees and did not acquire seniority and the accompanying right to preferential reinstatement when bricklayer jobs were again available. Plaintiffs allege that this seniority system, agreed to by Local 21, is part of a systematic attempt to exclude Negroes from employment as bricklayers.

In April 1966 Waters sought but was not offered reemployment with Harvester. At the same time, Donald Samuels, a member of Local 21, also applied for employment with Harvester as a bricklayer. Samuels, who had not previously worked for Harvester, was denied employment.

On May 20, 1966 Waters and Samuels filed charges with the Illinois Fair Employment Practices Commission alleging that Harvester refused to hire them as bricklayers on account of their race. Three days later the same charges were filed with the Equal Employment Opportunity Commission. On February 16, 1967 the EEOC found that no reasonable cause existed to believe that Harvester violated Title VII of the Civil Rights Act.[3]

[3] On March 8, 1967 Waters and the other bricklayers discharged in September 1964 were offered reemployment. Believing that he had been unsuccessful in his action before the EEOC, Waters accepted employment and worked as a bricklayer from March 20 until May 19, 1967 when he was again discharged. In August 1967 he was again offered employment by Harvester but refused since his petition for reconsideration was then pending before the EEOC.

In March 1967 plaintiff Waters petitioned for reconsideration of the EEOC's finding and provided the following additional allegations to support his request. In September 1965 a number of white bricklayers on layoff status elected to receive severance payments. By accepting severance pay under the collective bargaining agreement these bricklayers lost all rights to preferential reinstatement and became eligible for reemployment on the same basis as new employees. Subsequently, on June 15, 1966 Harvester and Local 21 amended their collective bargaining agreement to restore seniority to eight white bricklayers whose seniority had been lost after receiving severance pay. Three of these bricklayers were offered and accepted employment. Restoration of seniority to the remaining five workers relegated plaintiffs to a list further away from recall. As a result plaintiffs alleged that their applications for employment were not given equal consideration and that reemployment of the three white workers and restoration of seniority to all eight bricklayers perpetuated Harvester's continuing policy of hiring only white bricklayers.

On June 14, 1967 the EEOC granted Waters' request for reconsideration. On July 10, 1968 the EEOC withdrew its previous decision and issued a new finding that "reasonable cause exists to believe that respondent [Harvester] violated Title VII of the Civil Rights Act of 1964. . . ." On November 29, 1968 the EEOC notified Waters and Samuels that its conciliation efforts with Harvester had failed and provided them with notice of their right to sue.

On December 27, 1968 plaintiffs filed their complaint in the district court against Harvester and Local 21. The district court gave numerous grounds for dismissing the complaint. The court held that the Supreme Court's holding in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), could not be extended to create a cause of action for "private" racial discrimination in employment under

42 U.S.C. § 1981. The court further held that even if such a cause of action existed prior to 1964, it was, nevertheless, preempted by the enactment of Title VII of the 1964 Civil Rights Act. Furthermore, the court concluded that any action under section 1981 would be barred by the 120-day filing period of the Illinois Fair Employment Practices Act.

The district court disposed of plaintiffs' Title VII count against Local 21 by holding, pursuant to section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), that Local 21 could not be joined as a defendant since plaintiffs had not previously charged the union with discriminatory practices in a proceeding before the EEOC. The court further held the action against Harvester should also be dismissed since Local 21 and individual white bricklayers could be adversely affected if plaintiffs' action continued, thereby making Local 21 and the bricklayers, parties "needed for just adjudication" under Rule 19, Federal Rules of Civil Procedure.

Finally, the court held that the failure of plaintiffs to exhaust the grievance and arbitration procedures under the contract precluded suit under section 301(a) of the Labor-Management Relations Act. In a footnote the court also stated that plaintiffs failed to state a cause of action under the National Labor Relations Act, since exclusive jurisdiction under that Act is vested in the National Labor Relations Board.

The central issue in this appeal is whether Local 21 can be sued directly in the district court without previously being charged before the EEOC. If Local 21 is properly a defendant, full relief can be granted and the applicability of Rule 19, FED.R.CIV.P. need not be considered. We hold that a right to sue under section 1981 for "private" racial discrimination in employment existed prior to 1964. By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue.

However, in order to avoid irreconcilable conflicts between the provisions of section 1981 and Title VII, a plaintiff must exhaust his administrative remedies before the EEOC unless he provides a reasonable excuse for his failure to do so. Since we find on the basis of the material before us that plaintiffs have sufficiently justified their failure to charge Local 21 before the EEOC, we hold that the district court erred in dismissing plaintiffs' complaint against the union. Accordingly, we reverse for trial on the merits of plaintiffs' complaint against Local 21 under section 1981 and against Harvester under Title VII.

I. The Existence of a Right To Sue Under Section 1981

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court was asked to determine the scope and constitutionality of 42 U.S.C. § 1982.[4] In its original form section 1982 was part of section 1 of the Civil Rights Act of 1866.[5] The Court held that section 1 and

[4] 42 U.S.C. § 1982 reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[5] Section 1 of the Civil Rights Act of 1866 provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

its derivative, section 1982, prohibit "*all* racial discrimination, private as well as public, in the sale or rental of property. . . ." *Jones, supra*, at 413. The constitutionality of section 1982 was upheld on the basis of Congress' power to enact legislation to enforce the thirteenth amendment.[6]

Plaintiffs argue by analogy to the *Jones* case that 42 U.S.C. § 1981[7] is also derived from section 1 of the Civil Rights Act of 1866; that it is a valid exercise of congressional power under the thirteenth amendment; and that it is intended to prohibit private racial discrimination in employment by companies and unions. We agree.

There can be little doubt that section 1981, as well as section 1982, is derived directly from section 1 of the 1866 Civil Rights Act. In this judgment we rest primarily on the views expressed by the Supreme Court in the *Jones* case. In footnote 78, the Court said that "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981 (. . . derived from § 1 of the Civil Rights

[6] The thirteenth amendment provides:

Section 1:

Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2:

Congress shall have power to enforce this article by appropriate legislation.

[7] 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Act of 1866. . . .)" *Jones, supra,* at 442. This statement is buttressed by further mention of the derivation of section 1981 in footnote 28, *Jones, supra,* at 422.

The Supreme Court's view of the genesis of section 1981 is also supported by our own analysis. In 1870 Congress reenacted section 1 of the 1866 Act as section 18 of the 1870 Civil Rights Act. As part of the 1870 Act Congress also adopted section 16 which is similar, although somewhat broader, than section 1 of the 1866 Act. For purposes of determining the derivation of section 1981 we believe the enactment of section 16 of the 1870 Act is superfluous since section 18 is sufficiently broad to include the provisions of section 1981. This conclusion is supported by the failure of defendants to present legislative history to demonstrate that Congress intended to narrow the scope of the right "to make and enforce contracts" provision of section 1 of the 1866 Act by the enactment of section 16. In fact, a contrary intent is more likely since Congress by enacting section 16 undoubtedly was attempting to insure that the right to make and enforce contracts without regard to race was supported by the fourteenth as well as the thirteenth amendment.[8]

From the discussion in the *Jones* case, it is also evident that section 1981, as part of section 1 of the 1866 Act, was a valid exercise of Congress' power to enact legislation under the thirteenth amendment. We rest particularly upon the Supreme Court's analysis of *Hodges* v. *United States*, 203 U.S. 1 (1906). In *Hodges* a group of white workers were prosecuted under section 1981 for terrorist activities conducted against Negro employees of a saw mill. The Supreme Court reversed the defendants' conviction, holding that section 1981 was not designed to prohibit private acts of discrimination. The Court in *Jones* examined the decision in *Hodges* and ruled:

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[8] The fourteenth amendment was not adopted until 1868.

> The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled. *Jones, supra,* at 442-43 n. 78.[9]

Every indicia of congressional intent points to the conclusion that section 1981 was designed to prohibit private job discrimination. The words of the statute, which are almost identical in relevant respects to section 1982, must be construed to extend beyond insuring the bare legal capacity of Negroes to enter into contracts. Thus Congress provided that: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." We are not persuaded that the failure of Congress to expressly mention employment contracts makes section 1981 distinguishable from section 1982. This conclusion is supported by the legislative history of the 1866 Act which demonstrates Congress' intent that section 1 apply to employment contracts. As the Supreme Court noted in Jones:

> The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters. *Jones, supra,* at 427.

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[9] *See generally* A. Larson, NEW LAW OF RACE RELATIONS, 1969 WIS. L. REV. 470.

As an example of Congress' concern are the words of Representative Windom delivered on the floor of the House:

> Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil. *Cong. Globe, 39th Cong. 1st Sess.* 1159 (1866).

This explanation of the purpose of section 1 of the 1866 Act demonstrates that Congress contemplated a prohibition of racial discrimination in employment which would extend beyond state action.

Racial discrimination in employment by unions as well as by employers is barred by section 1981. The relationship between an employee and a union is essentially one of contract. Accordingly, in the performance of its functions as agent for the employees a union cannot discriminate against some of its members on the basis of race.[10] *Washington* v. *Baugh Construction Co.*, 61 LC ¶ 9346 at 6908 (W.D.Wash. 1969); *Dobbins* v. *Local 212, IBEW*, 292 F.Supp. 413 (S.D.Ohio 1968).

Defendants make several arguments to refute the existence of a cause of action based on private racial discrimination in employment prior to the enactment of Title VII of the 1964 Civil Rights Act. These arguments merit only brief discussion. Defendants maintain that the *Jones* decision was "foreshadowed" by cases such as *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Buchanan* v. *Warley*, 245 U.S. 60 (1917), and that, since similar "foreshadowing" is not present under section 1981, the Supreme Court would not extend its ruling in *Jones* to private discrimination in employment contracts. If, by foreshadowing, the defendants mean

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[10] We need not decide whether an employee possesses rights under § 1981 against the union if he is not a member: *See Steele* v. *Louisville & N. R.R. Co.*, 323 U.S. 192, 198-99 (1944).

that the state action concept has sometimes been employed in a flexible fashion to achieve just results, the cases upon which they rely foreshadow the demise of the requirement of state action under section 1981 as well. Furthermore, it is mistaken to suggest that courts have not used similar means to circumvent the requirement of state action in the area of employment contracts. *See Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198-99 (1944).

Defendants also argue that the *Jones* case is distinguishable from the case at bar since property rights have traditionally been subject to greater governmental regulation than other private activity. We disagree. Labor contract relations are subject to governmental regulation nearly as extensive as property rights. Furthermore, we are unclear why defendants' assertion, even if it were true, is relevant in construing section 1981. Finally, defendants maintain that the Jones case should [not] be given retroactive application. This argument is sufficiently answered by the fact that the Supreme Court has already applied the *Jones* case retroactively in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

II. Title VII of the Civil Rights Act of 1964

A. Did Title VII repeal section 1981 by implication?

Having established the existence of a cause of action under section 1981 prior to 1964, we must now ascertain whether Congress, by the enactment of Title VII, intended to repeal the right to bring suit for racial discrimination in employment under the former section. The rules governing this determination have been stated by the Supreme Court in *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936):

> The amending act just described contains no words of repeal; and if it effected a repeal of § 25 of the

> 1913 act, it did so by implication only. The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication —(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

We need concern ourselves only with the doctrine of repeal by implication since Title VII does not provide for express repeal of previous legislation. Furthermore, the second category of repeal by implication noted by the Supreme Court is inapplicable since section 1981 covers rights other than the right to contract for employment.

Defendants argue that Title VII was intended by Congress to be a comprehensive scheme to eliminate racial discrimination in employment thereby automatically abolishing all rights previously existing under section 1981. They point first to the fact that Congress in enacting Title VII was unaware of the possibility that aggrieved persons could bring civil suits under section 1981.[11] They

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[11] They rely especially upon the following statements by Congressman Lindsay:

> The situation in the law as it exists today, without the bill before us having passed, is that any individual can bring an

would distinguish the *Jones* case on this basis since the availability of section 1982 was mentioned in debate over Title VIII of the 1968 Civil Rights Act. *Jones, supra,* at 413-17. After the recent decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this argument is no longer viable. In *Sullivan* the Supreme Court held that the right to bring suit under section 1982 was unaffected by the enactment of the Public Accommodations provision of the 1964 Civil Rights Act, even though the legislative history of that Act fails to mention section 1982. *Sullivan, supra,* at 237. Thus the relevant question for the purpose of determining whether rights under section 1981 were repealed by implication is not whether Congress was aware of section 1981, but whether the legislative history demonstrates that Congress would have intended repeal if it had been aware of preexisting rights under the 1866 Civil Rights Act.

Contrary to the assertions of defendants, the legislative history of Title VII strongly demonstrates an intent to preserve previously existing causes of action. Thus Congress rejected by more than a two-to-one margin an amendment by Senator Tower to exclude agencies other than the EEOC from dealing with practices covered by Title VII. 110 *Cong. Rec.* 13650-52 (1964). Courts have accordingly held that Title VII does not preempt the jurisdiction of the National Labor Relations Board to hear charges of unfair labor practices based on the union's duty of fair representation. *United Packinghouse, Food & Allied Workers International Union* v. *NLRB*, ——

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action to invoke the protection of the 14th amendment with respect to a deprivation of a constitutionally protected right.

> In other words, if there is a custom or usage, . . . or if there is a practice which has the force of State power behind it, which has State involvement in it, then today an individual may bring action for an injunction. 110 *Cong. Rec.* 1966 (1964).

F.2d —— (D.C. Cir. 1969); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966).

Defendants argue, however, that the most important indicia of intent are the provisions established in Title VII itself and that the existence of a cause of action under section 1981 would virtually destroy these provisions. In addition to the availability of immediate access to the courts, they point to large differences in the class of persons covered by Title VII and section 1981 and variations in the substantive prohibitions of the two enactments. We agree that the difficulties in reconciling section 1981 and Title VII are great and that the areas of possible conflict are numerous. Nevertheless, the *Posadas* case cautions that "the intention . . . to repeal must be clear and manifest" and holds that "effect should be given to both if possible." Thus we cannot conclude that the possibility of conflict demonstrates that section 1981 was wholly repealed by implication.[12] We are convinced that the two acts can, in large measure, be reconciled and effect given to the congressional intent in both enactments. Therefore, we hold that conflicts must be resolved on a case-by-case basis.[13] Accordingly, we turn to section 706(e)[14] to determine whether plaintiffs' cause

[12] *See generally Comment, Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615 (1969).

[13] We intimate no views concerning the numerous conflicts between § 1981 and Title VII cited by Local 21 and confine our analysis solely to resolution of those conflicts which are before us in this case.

[14] 42 U.S.C. § 2000e-5(e) provides in relevant part:

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to obtain voluntary compliance with this sub-chapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . . by the person claiming to be aggrieved.

of action under section 1981 against Local 21 can be reconciled with the "charged party" language of Title VII.

B. The effect of section 706(e) on the right to bring suit under section 1981.

Previously in construing section 706(e) this court has held that: "It is a jurisdictional prerequisite to the filing of a suit under Title VII that a charge be filed with the EEOC against the party sought to be sued, 42 U.S.C. § 2000e-5(e)." *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (1969).

Other courts which have considered the question have also held that the "charged party" language of section 706(e) prohibits Title VII suits in the district court against persons not previously charged before the EEOC. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Mickel* v. *South Carolina Employment Service*, 377 F.2d 239 (4th Cir.), *cert. denied*, 389 U.S. 877 (1967); *Butler* v. *Local 4, Laborers' Union*, 61 LC ¶ 9348 at 6917 (N.D. Ill. 1969); *Cox* v. *United States Gypsum Co.*, 284 F.Supp. 74 (N.D.Ind. 1968), *modified*, 409 F.2d 289 (7th Cir. 1969); *Sokolowski* v. *Swift & Co.*, 286 F.Supp. 775 (D.Minn. 1968); *Mondy* v. *Crown Zellerbach Corp.*, 271 F.Supp. 258 (E.D. La. 1967); *Moody* v. *Albemarle Paper Co.*, 271 F.Supp. 27 (E.D.N.C. 1967). Since these courts were not presented with arguments concerning the existence of a right to sue under section 1981, the cases cited were properly decided. They do not hold, however, that failure to charge a party before the EEOC precludes suit under section 1981. We hold such suits can be reconciled with section 706(e) and continue to exist in a limited class of cases.

The language of section 706(e) itself does not compel the conclusion that Congress intended to repeal the right to bring suit directly under section 1981. Even though that section, in discussing access to the courts, concentrates

on the situation where an aggrieved party has first proceeded to the EEOC, there is no provision which specifically requires prior recourse before the Commission. Since Congress has expressly prohibited direct access to federal courts in similar situations under other statutes,[15] we hesitate to read section 706(e) as requiring recourse before the EEOC as a jurisdictional prerequisite in all cases.

Furthermore, the legislative history of Title VII fails to conclusively demonstrate that section 706(e) was designed to preclude civil suits by aggrieved parties without prior recourse before the EEOC. Although statements by members of Congress from the floor during debate should be viewed with caution,[16] we note the following assertion by Senator Humphrey, proponent and floor manager of the bill: "[T]he individual may proceed in his own right at any time. He may take his complaint to the Commission, he may by-pass the Commission, or he may go directly to court." (110 *Cong. Rec.* 14 188 (1964).

Despite these indications we are convinced that had Congress been aware of the existence of a cause of action under section 1981, the absolute right to sue under that section would have been modified.[17] Throughout the legislative history of Title VII, Congress expressed a strong prefer-

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[15] *See Age Discrimination in Employment Act of 1967*, 29 U.S.C. § 626(d), where a civil action by a private person is expressly prohibited unless the Secretary of labor is given sixty days' notice during which time he may attempt conciliation.

[16] Contrary statements were made by opponents, including Senator Ervin who described the provisions of section 706(e) as follows: "[T]he bill puts the key to the courthouse door in the hands of the Commission." 110 *Cong. Rec.* 14, 188 (1964).

[17] Our conclusion is not inconsistent with the Supreme Court's holding in *Jones* that the right to proceed directly in federal court under § 1982 is unaffected by the enactment of Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §§ 3601 to 3619. This is true because § 812 of that Act provides an aggrieved party with the

ence for resolution of disputes by conciliation rather than court action. Conciliation was favored for many reasons. By establishing the EEOC Congress provided an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated. Conciliation also was designed to allow a respondent to rectify or explain his action without the public condemnation resulting from a more formal proceeding. Furthermore, the absence of direct government coercion was thought to lessen the antagonism between parties and to encourage reasonable settlement. The need for voluntary compliance was stressed since more coercive remedies were likely to inflame respondents and encourage them to employ subtle forms of discrimination.[18]

Because of the strong emphasis which Congress placed upon conciliation, we do not think that aggrieved persons should be allowed intentionally to by-pass the Commission without good reason. We hold, therefore, that an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies. We need not define the full scope of this exception here. Nevertheless, we believe that plaintiffs in the case at bar have presented allegations sufficient to justify their failure to charge Local 21 before the Commission.

We rely particularly on the following allegations. The primary charge of racial discrimination made by plaintiffs

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alternative of by-passing the Secretary of Housing and Urban Development altogether and proceeding directly in a civil action in the district court. Nor is our decision inconsistent with the Supreme Court's holding in *Sullivan* that § 1982 was unaffected by the enactment of Title II of the 1964 Civil Rights Act. Section 207(b) of that title contains an express clause saving prior legislation. *Sullivan*, *supra*, at 238.

[18] *See generally M. Sovern*, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966); DISCRIMINATION IN EMPLOYMENT AND IN HOUSING; PRIVATE ENFORCEMENT PROVISIONS OF THE CIVIL RIGHTS ACTS OF 1964 AND 1968, 82 HARV. L. REV. 834 (1969).

is based on an amendment of the collective bargaining agreement between Harvester and Local 21. That amendment occurred in June 1966 *after* plaintiffs filed their charge before the EEOC. Until this amendment plaintiffs were, at least arguably, unaware of the participation of Local 21 in Harvester's alleged policy of racial discrimination. From the affidavits before us, it is evident that Local 21 was aware of the charges against Harvester, and by strong implication against itself, as early as October 1966.[19] Subsequent to this time Local 21 presumably could have rectified any acts of discrimination on its part. Thus Local 21 suffered only slight prejudice from the failure of plaintiffs to charge it before the EEOC.

It is inconceivable that Congress would have intended to do away with the right to sue directly under section 1981 in these circumstances. To do so would bind complainants by the four corners of an informal charge and defeat the effective enforcement of the policies underlying Title VII. *Cf. Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968). At the administrative stage the charge is usually drafted by laymen untrained in the law.

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[19] We note especially the statements of James W. Quisenberry, an investigator for the EEOC, whose affidavit reads in pertinent part:

> In the regular performance of my official duties, pursuant to an investigation of charges filed May 23, 1966, by William Waters and Donald Samuels against the Wisconsin Steel Works, I twice contacted Edward T. Joyce, President of Local 21, United Order of American Bricklayers and Stone Masons. The first meeting occurred in October 1966; and the second meeting took place on August 8, 1967.
>
> In October, 1966, during my first meeting with Edward T. Joyce, I informed him fully of the nature of the charges made by William Waters and Donald Samuels. I informed Mr. Joyce that Waters and Samuels claimed that Wisconsin Steel Works had discriminatorily rejected their employment applications of April 3, 1966.

A requirement that the complainant charge every person who may be involved in the alleged acts of discrimination would be unnecessarily harsh.[20] Nor do we believe that the aggrieved party is protected by the right to amend his charge since amendment procedures are generally beyond the competence of layman complainants.[21] To hold otherwise would be to deny effective relief intended by Congress solely on the basis of procedural defects before the Commission.

Allowing Local 21 to be sued directly in district court under section 1981 is consistent with the flexible interpretation of the requirement of conciliation recently given by other courts. Actual conciliation or even an attempt at conciliation by the EEOC no longer presents a jurisdictional barrier to filing suit in a district court. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Johnson* v. *Seaboard Air Line R.R. Co.*, 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). Moreover, courts have allowed complainants who have not been before the EEOC to join with complainants who have been before the agency as members of a class seeking relief against a common employer. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Oatis* v. *Crown Zellerbach Corp.*,

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[20] The harshness of such a requirement is particularly evident in this case. If this action were dismissed against both Harvester and Local 21, plaintiffs would be forced to file new charges before the EEOC. Section 706(d) of Title VII requires that charges be filed within 210 days after the occurrence of the alleged unlawful employment practice. Unless the failure to hire plaintiffs in April 1966 were considered to be a continuing violation, new charges against Harvester and Local 21 would be deemed untimely and plaintiffs would be left without a remedy.

[21] Defendants argue that the burden of amendment should be placed on Commission members under 42 U.S.C. § 2000e-5(a). We think the fact that the Commission did not attempt to amend plaintiffs' charge in this case demonstrates the inadequacy of such a remedy.

398 F.2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). We think these cases demonstrate that the policy in favor of conciliation should not be transformed into a technical device used to obstruct the enforcement of prohibitions against racial discrimination in employment and to deny relief to those Congress has sought to protect.

The defendants make one final contention in arguing that the district court was correct in dismissing plaintiffs' claim against Local 21. They urge that plaintiffs' action under section 1981 is barred pursuant to 28 U.S.C. § 1652 and 42 U.S.C. § 1988 by the 120-day filing period for a discrimination claim under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48 § 851 *et seq.* (1967). We disagree. Under those sections the statute of limitations applicable to civil rights actions is controlled by the statute of limitations which governs the most analogous state action. *Jones* v. *Jones*, 410 F.2d 365 (7th Cir. 1969). We are not convinced that the Illinois F.E.P.A. is the most analogous state action under these provisions. The Illinois act provides only for an administrative remedy and review of the F.E.P.C.'s findings in the state courts. Different considerations obviously apply to suits by private litigants in courts of law. In contrast to the Illinois F.E.P.A., the entire burden of investigating and developing a case under section 1981 lies with the private litigant. Furthermore, the short limitations period contained in the Illinois act is designed to encourage conciliation and private settlement. When an aggrieved party seeks court relief, conciliation has generally failed. Accordingly, the appropriate limitations period in this case is governed by our recent decision in *Baker* v. *F & F Investment* (No. 17815, Jan. 6, 1970). That case held that civil actions under section 1982 are subject to the five-year statute of limitations provided in Ill. Rev. Stat. ch 83 § 16 (1967), governing civil actions not otherwise provided for. Since we see no difference between section 1981 and section 1982 for purposes of determining the appropriate statute of

limitations, plaintiffs' action against Local 21 was timely filed.

We hold that the district court erred in dismissing plaintiffs' complaint against Local 21. Since the relief available to plaintiffs under section 1981 is potentially as broad as that available in their action against Harvester under Title VII, *Sullivan* v. *Little Hunting Park, Inc., supra*, at 238-40, we need not consider the district court's ruling concerning the applicability of Rule 19, FED.R.CIV.P.[22]

III. BREACH OF CONTRACT AND THE DUTY OF FAIR REPRESENTATION

A. Action against Harvester under section 301(a)

Plaintiffs argue that the allegations of their complaint also state a cause of action against Harvester under section 301(a) of the Labor-Management Relations Act as well as under Title VII.[23] We think plaintiffs misconceive the scope and purpose of section 301(a). Nevertheless, these allegations, if liberally construed, are sufficient to withstand a motion to dismiss under that section. Accordingly, we hold that the district court erred in dismissing plaintiffs' action under section 301(a) and order that their cause of action against Harvester for breach of contract be reconsidered on remand of this case.

Section 301(a), unlike Title VII, is not designed primarily as a remedy for racial discrimination in employment.

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[22] Local 21 adequately represents the interests of absent bricklayers thereby refuting the argument that individual white bricklayers are indispensable parties. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969).

[23] Section 301(a), 29 U.S.C. § 185(a) (1965), provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations, may be brought in any district court of the United States.

Instead, Congress enacted section 301(a) to provide a means by which collective bargaining agreements could be enforced in federal and state courts. Suits under section 301(a) require plaintiffs to allege specifically which provisions of the collective bargaining agreement have been violated by the employer. Plaintiffs' complaint alleges that the agreement amending the collective bargaining agreement entered into by Local 21 and Harvester in June 1966 violated the seniority provisions of the contract. Since parties to a labor contract are always free to amend their agreements, we do not see how an amendment through the ordinary processes of collective bargaining can be considered a breach of contract. *Humphrey* v. *Moore*, 375 U.S. 335, 359 (concurring opinion of Mr. Justice Harlan) (1964). Nevertheless, the complaint along with the accompanying affidavits of plaintiff Waters, if broadly construed, may be read to include allegations that plaintiffs were treated in a discriminatory fashion by Harvester in violation of the contract between Local 21 and Harvester. This construction is sufficient to survive a motion to dismiss. *Czosek* v. *O'Mara*, 38 U.S.L.W. 4151 (Feb. 24, 1970); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). On remand plaintiffs should be permitted to amend their complaint to allege with greater specificity which provisions of the collective bargaining agreement were violated by Harvester.

To bring an action under section 301(a) an individual employee also must exhaust the grievance provisions of his collective bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). As the Supreme Court held in *Vaca* v. *Sipes*, 386 U.S. 171, 186 (1967):

> "[T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

In the instant case the affidavit of plaintiff Waters alleges in very general terms that any attempt to seek redress through the grievance mechanism of the contract would be futile.[24] Harvester argues that plaintiffs cannot prove a breach of the duty of fair representation sufficient to satisfy the exhaustion requirement without at least attempting to put the grievance mechanisms into operation by a demand on union officials. We disagree. Although it may be difficult to establish such proof in this case, we can envision situations in which union representatives repeatedly have breached their duty of fair representation in previous dealings with an employee. In such cases the employee could reasonably believe that attempts to seek the aid of the union in presenting a grievance would be utterly futile, thus justifying his failure to exhaust remedies. *Cf. Glover* v. *St. Louis, San Francisco R.R. Co.*, 393 U.S. 324 (1969). As a result we are unable to say beyond a doubt that plaintiffs' allegations of futility are insufficient to excuse their failure to exhaust the grievance provisions of their contract. *Czosek* v. *O'Mara*, *supra*, slip opinion at 2-3. On remand of this case plaintiffs should be allowed to amend their complaint to allege circumstances supporting their assertion that attempts to persuade Local 21 to pursue their grievances would be futile.

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[24] Waters' affidavit includes the following statements:

> I have repeatedly called upon the union to represent me and to protect me against racial discrimination in employment.
>
> Despite my complaints, the union has failed adequately and fairly to represent me in disputes with employers involving racial discrimination.
>
> * * *
>
> Because Nicholas Popovic is the official through whom I would have to channel any formal complaints . . . and because Local 21 has failed to change its policy of discriminating against black bricklayers, even after receiving numerous complaints from me, I believe that any futher attempts to channel my grievances through the union would be futile.

B. Duty of fair representation action against Local 21

Plaintiffs assert that Local 21 violated its duty of fair representation by participating or at least acquiescing in Harvester's discriminatory hiring policies. They maintain that this breach of duty by Local 21 states a cause of action under section 301(a). Although plaintiffs again read section 301(a) too broadly, we believe that their complaint, if liberally construed, states a cause of action under that section. Therefore, on remand of this case the district court should reconsider plaintiffs' complaint against Local 21 under section 301(a).

Plaintiffs are incorrect in arguing that section 301(a) is intended to provide federal jurisdiction for suits seeking relief for violation of the duty of fair representation, *Sciaraffa* v. *Oxford Paper Co.*, 62 LC ¶ 9396 at 6549 (S.D. Me. 1970). The origin of that duty is statutory, first recognized in cases involving racial discrimination by unions certified as exclusive bargaining agents under the Railway Labor Act. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1943); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 120 (1943). The Supreme Court subsequently held that the provisions of the National Labor Relations Act included a similar duty. *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955); *rev'g*, 223 F.2d 739 (5th Cir. 1955); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). Suits for breach of statutory duty may be brought under federal question or civil rights jurisdictional provisions. *Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968); *Williams* v. *Pacific Maritime Assoc.*, 384 F.2d 935 (9th Cir. 1967).[25]

[25] We do not agree with the district court's conclusion that such suits can only be brought before the National Labor Relations Board. Although the NLRB has assumed jurisdiction and has held that breach of the duty of fair representation constitutes an unfair labor practice under § 8(b)(1)(A), *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963);

The duty of fair representation has only limited relevance to actions under section 301(a). A union can be joined as a defendant under that section, if by breach of its statutory duty, the union has prevented presentment or enforcement of an employee grievance under the collective bargaining agreement.[26] *Vaca* v. *Sipes*, *supra*, at 197 n. 18. In such cases a plaintiff-employee can recover only for injury which flows solely from the union's own conduct. As a result plaintiff's recovery against the union is limited in most cases to compensation for the union's failure to timely assert an employee grievance against an employer, *Vaca* v. *Sipes*, *supra*, at 196-98. When viewed in a light most favorable to plaintiffs, we think their complaint makes such an allegation. Accordingly, plaintiffs' cause of action against the union under section 301(a) should be considered on remand.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

FAIRCHILD, *Circuit Judge* (concurring). I concur in reversal and remand for further proceedings against both defendants. I have reached conclusions which differ in some

Local 12, United Rubber Workers v. *NLRB*, 368 F.2d 12 (5th Cir. 1966), the Supreme Court has held that the NLRB's jurisdiction is not exclusive. *Vaca* v. *Sipes*, *supra*, at 178-81. Since plaintiffs have waived their claim that their complaint states a cause of action under the National Labor Relations Act, see n. 1, *supra*, we need not consider the applicability of that Act to the allegations before us.

[26] Unions also can be joined as defendants if the union is a moving force in producing a violation of the contract by the employer. *Vaca* v. *Sipes*, *supra*, at 197 n. 18. *Cf. Humphrey* v. *Moore*, 375 U.S. 335 (1964). We do not understand plaintiffs to so allege in this case. However, on remand leave should be granted to allow them to make such allegations.

respects from those set forth in Chief Judge Swygert's majority opinion. They are as follows:

(1) *Plaintiffs' right to proceed against Harvester under Title VII.* Plaintiffs allege that Harvester, as an employer, is engaging in what Congress declared an unlawful employment practice. Congress authorized an action for the prevention and redress of such practice, but did not suggest that all parties responsible for the practice or all parties whose interests might be affected by its termination must be joined. In my opinion, Rule 19(b) F.R.C.P. does not authorize dismissal of an otherwise proper Title VII action against an employer on account of the absence of the union and other employees. Such use of Rule 19 would frustrate the intent of Congress in this type of case.

(2) *Plaintiffs' Title VII action against the union.* Plaintiffs allege that the union was a party to Harvester's collective bargaining agreement, containing allegedly discriminatory seniority lists, and that (after the charges were filed with EEOC) the union agreed to a modification, allegedly for the purpose of permitting a discriminatory reinstatement. Sec. 2000e-2(c)(3) declares it an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." The complaint does not use statutory language, but no argument has been made that it failed to allege an unlawful employment practice on the part of the union.

Assuming that the allegation is sufficient, it appears from the complaint that the union was to some degree responsible (in concert with the employer) for the practice of discrimination under attack, acted to further the practice after a charge had been filed against the employer, and had actual notice of the commission's investigation of the charge. Under all the particular circumstances of this case, I conclude that a strict reading of the statutory

authorization of an action "against the respondent named in the charge" is unwarranted, and that the plaintiffs could properly bring action against both the employer and the union.

EEOC filed an amicus brief in which it argued that in this case plaintiffs could properly have joined the union as a defendant without having named it in the administrative charge. EEOC also suggested a procedure by which the defect, if any, could be cured. Under it, the district court would have stayed the action, pending the filing of a charge by plaintiffs against the union. EEOC could then process the charge so as to allow joinder of the union. Such an approach has been employed in other cases, e.g. *Norman v. Missouri Pacific Railroad* (8th Cir., 1969), 414 F2d 73; *Local U. No. 329, I.L.A. v. South Atlanta & Gulf Coast Dist.* (S.D. Tex., 1968), 295 FSupp. 599. It seems clear that these steps would obviate any jurisdictional question, but under the facts peculiar to this record, it would seem an unnecessary exercise.

(3) *Plaintiffs' possible action under § 1981.* I agree that, given the Supreme Court's *Jones* v. *Mayer* reading of § 1982 with respect to racial discrimination in the sale of property, there is no persuasive reason for reading § 1981 more narrowly with respect to racial discrimination in employment. There remains the difficult question of whether and to what extent the enactment of Title VII restricted reliance upon § 1981. It is unnecessary to resolve that question at this stage if plaintiffs are permitted to proceed against both defendants under Title VII. Perhaps the trial will develop facts which will make resolution important in this case, and I think it wiser not to attempt an answer until that point.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Tuesday, April 28, 1970

Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

No. 17895

WILLIAM WATERS and DONALD SAMUELS, etc.,
Plaintiffs-Appellants,

vs.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, etc., et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court, in accordance with the opinion of this Court filed this day.

APPENDIX D

Civil Rights Act of 1964

Pub. L. No. 88-352, 88th Cong., 1st Sess., 1964; 78 Stat. 241, 253-66; 42 U.S.C. §§ 1971, 2000e—2000e-15; F.C.A. 42 §§ 1971, 2000e—2000e-15

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of

race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year,

or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an

employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any indi-

vidual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate.

* * *

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all of its powers at any other place. The Commission may establish such regional or State offices as its deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

* * *

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the

Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice

occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or

(2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative

action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under subsection (e) and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission

and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to

assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated

or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 706 in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Except as provided in subsection (d), every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and

joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may (1) apply to the Commission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

(d) The provisions of subsection (c) shall not apply to any employer, employment agency, labor organization, or joint labor-management committee with respect to matters occurring in any State or political subdivision thereof which has a fair employment practice law during any period in which such employer, employment agency, labor organization, or joint labor-management committee is subject to such law, except that the Commission may require such notations on records which such employer, employment agency, labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title. Where an employer is required by Executive

Order 10925, issued March 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. (a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

(b) If the respondent named in a charge filed under section 706 fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 709(a), or if any person required to comply with the provisions of section 709(c) or (d) fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such

person an order requiring him to comply with the provisions of section 709(c) or (d) or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

(c) Within twenty days after the service upon any person charged under section 706 of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 709(a), such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this title or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

(d) In any proceeding brought by the Commission under subsection (b), except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

* * *

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed

to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

* * *

SEC. 716. (a) This title shall become effective one year after the date of its enactment [July 2, 1964].

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.